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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 328

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY, APPELLANTS,

vs.

OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS

No. 329

OTHO A. COOK, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS, PETITIONER,

vs.

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO AND LELIA F. CRAIGO, PARTNERS DOING BUSINESS AS WILSON LUMBER COMPANY.

APPEALS FROM AND WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED AUGUST 14, 1935.

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APPEAL FROM AND WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1945.

[fol. 1] **IN THE SUPREME COURT OF ARKANSAS**

No. Series 7527

OTHO A. COOK, Commissioner, Substituted for Murray B. McLeod, Commissioner of Revenues of the State of Arkansas, Appellant,

vs.

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO and Lelia F. Craigo, Partners Doing Business as Wilson Lumber Company, Appellees

STIPULATION OF THE PARTS OF RECORD TO BE INCLUDED IN THE TRANSCRIPT—Filed July 6, 1945

It is stipulated and agreed by and between Scott Wood, Counsel for Warren W. Wilson, et al., Appellants in the Supreme Court of the United States, and Herrn Northcutt, Counsel for Appellee in the Supreme Court of the United States, that the following portions of the record are indicated under the provisions of Rule 10, to be included in the transcript:

1. Complaint in the Garland Chancery Court.
2. The answer of the Commissioner of Revenues of the State of Arkansas.
3. The stipulation of the plaintiffs and the defendants in the Garland Chancery Court.
4. The Timber Sales Agreement, which is Exhibit "A" to the stipulation, omitting that part appearing at pages 43 to 49, inclusive, of the transcript in the Supreme Court of Arkansas.
5. The Decree of the Garland Chancery Court.
6. Opinion and judgment of the Supreme Court of Arkansas.
7. The petition for re-hearing in the Supreme Court of Arkansas, and its filing date.
8. Order overruling petition for re-hearing in the Supreme Court of Arkansas, with date.
9. Petition for allowance of appeal to the Supreme Court of United States, and assignment of errors.
10. Allowance of appeal and date.
11. Supersedeas bond on appeal, with approval and date.

[fol. 2] 12. All statements filed under the provisions of Rules 9, 10 and 12, of the Supreme Court of the United States.

13. Acknowledgment of service of:

(a) Petition for appeal.
(b) Order allowing allowance of appeal.
(c) Appeal bond.
(d) Assignment of errors.
(e) Jurisdictional statement under Rule 12, and statement calling attention to Paragraph 3, of Rule 12.

14. Motion to dismiss in part.
15. Petition for cross appeal.
16. Order allowing cross appeal.
17. Appeal bond of cross appellant.
18. Assignment of errors.
19. Statement of points to be relied upon by cross appellant.
20. Waiver as to citation to appellant.
21. Acknowledgment of receipt by appellant of:

(a) Cross petition for appeal.
(b) Order allowing cross appeal.
(c) Copy of cross appeal bond.
(d) Assignment of errors.
(e) Statement of points relied upon by cross appellant.
(f) Waiver of citation and service on appellant
(g) Statement as to jurisdiction.
(h) Motion to dismiss in part.

22. Statement by cross appellant as to jurisdiction with motion to affirm in part.

Scott Wood, Herrn Northcutt.

[File endorsement omitted.]

[fol. 3] IN THE CHANCERY COURT OF GARLAND COUNTY

WARREN W. WILSON, MABEL M. WILSON, RICHARD L. CRAIGO and Lelia F. Craigo, Partners Doing Business as Wilson Lbr. Co., Plaintiffs,

vs.

MARION ANDERSON, as Sheriff of Garland County, Arkansas; and John E. Jones as Clerk of the Circuit Court of Garland County, Arkansas, Defendants

COMPLAINT—Filed January 11, 1943

1. The plaintiffs, Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo, and Lelia F. Craigo, are partners doing business in Garland County, in the State of Arkansas, under the firm name of Wilson Lumber Company; the defendant, Marion Anderson, is sheriff of Garland County, Arkansas; and the defendant John E. Jones, is clerk of the circuit court of Garland County, Arkansas.

2. The plaintiffs are and were at the times hereinafter mentioned engaged in the business of severing timber from the soil and converting same into lumber and doing wholesale and retail lumber business.

3. The plaintiffs, in carrying on their business, have complied with all of the laws of the State of Arkansas and have paid to the State of Arkansas all sums due the State for the privilege of severing timber from the soil; but notwithstanding the fact that the plaintiffs have paid the state all the privilege taxes and state taxes, the Commissioner of Revenues of the State of Arkansas did on the 22nd day of December, 1942, file in the office of the clerk of the circuit court of Garland County, Arkansas, his certificate claiming that the plaintiffs are indebted to the State of Arkansas in the following sums, to-wit:

for 6,298,854 feet of timber severed from the soil between January 1, 1937, and October 1, 1942 at 7¢ per thousand	$440.92
25% penalty	110.23
Total	$551.15

[fol. 4] And the defendant, John E. Jones, as clerk of the circuit court of Garland County, Arkansas, has filed the

said certificate in the manner provided by Section 8440 to Section 8442 inclusive of Pope's Digest of the Statutes of Arkansas.

4. The alleged claim of the State of Arkansas against these plaintiffs has been made on account of the fact that the plaintiffs, during the time named, have severed timber from lands belonging to the United States situated within the national forests in the State of Arkansas, said lands being under the exclusive control and jurisdiction of the United States.

5. All of said timber for which the alleged claim of the State of Arkansas is being made was cut by the plaintiffs by contract executed by and between the United States of America and these plaintiffs under and by virtue of the authority granted by Acts of Congress authorizing sale of timber in the national forests; and the State of Arkansas, by its said demand against the plaintiffs, is seeking to interfere with the title, rights and privileges which were granted to the plaintiffs by the United States; and the state's demand against the plaintiffs is in violation of the Acts of Congress above referred to.

6. The defendant, John E. Jones, as clerk of the circuit court of Garland County, has issued an execution against the plaintiffs based on the said certificate of the Commissioner of Revenues of the State of Arkansas, and said execution has been placed in the hands of Marion Anderson, the Sheriff of Garland County, Arkansas; and the said sheriff, unless he is enjoined by this court, will seize property of the plaintiffs under said execution.

7. The certificate of the Commissioner of Revenues of the State of Arkansas above referred to has been filed and indexed on the judgment docket of the circuit court of Garland County as transcript judgment number 445; and the [fol. 5] same is a cloud on the title of all the real property belonging to the plaintiffs in Garland County; and the said demand of the State of Arkansas is an illegal and void exaction within the meaning of Section 13, Article 16 of the Constitution of the State of Arkansas, and is in violation of the second paragraph of Section 3, Article 4, and Article 6, Clause 2 of the Constitution of the United States.

Wherefore, the plaintiffs pray that the defendant, Marion Anderson, as sheriff of Garland County, be enjoined from

seizing any of the plaintiffs' property under said void execution; that the said execution be cancelled; that the said certificate issued by the Commissioner of Revenues of the State of Arkansas be canceled; that the said transcript judgment number 445 on the record of the circuit court of Garland County be canceled and removed as a cloud on the title to the plaintiff's real property; and that a temporary order be issued herein enjoining the sheriff from seizing any of the plaintiff's property under said execution; and for costs and other relief.

Murphy & Wood, by Scott Wood, Attorneys for plaintiffs.

[File endorsement omitted.]

[fol. 6] IN THE CHANCERY COURT OF GARLAND COUNTY

[Title omitted]

ANSWER—Filed June 22, 1943

Comes now Murray B. McLeod as Commissioner of Revenues for the State of Arkansas and a party defendant herein and for answer to the complaint of the plaintiffs would state:

1. Defendant admits allegation No. 1 of the plaintiff.

2. Defendant admits allegation No. 2 of the plaintiff.

3. Defendant denies that the plaintiffs have complied with all the laws of Arkansas nor have paid to said State all sums due for severing timber from the soil, but does admit that the defendant has filed its certificate of indebtedness as alleged by the complaint.

4. Defendant denies allegation No. 4 of the plaintiff.

5. Defendant denies allegation No. 5 of the plaintiff.

6. Defendant admits allegation No. 6 of the plaintiff.

7. Defendant denies allegation No. 7 of the plaintiff.

Wherefore, defendant prays the court to dismiss the complaint of the plaintiffs for want of equity for its costs expended and for all other relief to which it is entitled in the premises.

Herrn Northcutt, Solicitor for Defendant; Murray B. McLeod, Commissioner.

[File endorsement omitted.]

[fol. 7] IN THE CHANCERY COURT OF GARLAND COUNTY

[Title omitted]

STIPULATION OF FACTS—Filed February 1, 1944

Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, partners doing business as Wilson Lumber Company, by their solicitors, Murphy & Wood; and Murray B. McLeod as Commissioner of Revenues of the State of Arkansas by his solicitor, Herrn Northcutt, do hereby stipulate as follows:

1. The court shall consider the facts set out herein to be the evidence in the case and may render judgment on the merits of the cause upon the facts as agreed to herein.

2. The Commissioner of Revenues of the State of Arkansas is the proper party to this action and may be declared a party defendant hereof.

3. The allegations containing in paragraphs 1 and 2 of the plaintiff's complaint are true.

4. That the Commissioner of Revenues of the State of Arkansas has filed a certificate of indebtedness as alleged in paragraph 3 of plaintiff's complaint.

5. That the claim of the State of Arkansas is based on the fact that plaintiffs have severed timber in the United States National Forest under several contracts executed at different times and entered into by plaintiffs and the United States Department of Agriculture. All of said contracts were substantially in the form of the written contract hereto attached and marked Exhibit "A", which was executed February 28, 1940, except as to amounts, quantities, descriptions of lands, dates, etc.

6. The statements contained in paragraph 6 of plaintiff's complaint are true.

[fol. 8] 7. The statements of fact contained in paragraph 7 of the plaintiff's complaint are true; but the State does not agree to the conclusions of law therein set forth.

8. All Acts of Congress relevant to the issues involved may be read from U. S. C. A. of U. S. Revised Statutes, or other recognized publications without complying with any formal legal requirements.

9. It is further agreed and stipulated that without waiving the right to object to any evidence as incompetent, immaterial or irrelevant that upon five days notice to the opposing party depositions may be taken relative to the following:

(a) The form of the advertisements that were published by the Department of Agriculture with respect to the severing of the timber that is involved in this action.

(b) The time allowed for severing and removing said timber.

(c) That the plaintiff, Wilson Lumber Company, was required to pay $0.15 per thousand feet for a cooperative fund to be used in fire prevention, making roads, etc., in the national forests.

(d) That it has been customary for lumber dealers in the Ouachita National Forest area ever since the severance tax statute was enacted to pass the tax on to the respective owners of lands from which timber was cut.

(e) That no effort was ever made by the state to collect severance tax on timber cut from the national forest until about the year 1939, and that lumber dealers did not make reports to the State of Arkansas respecting timber cut in the national forest, and no such reports were demanded by the State of Arkansas, and the State, prior to 1939, did not require lumber dealers to apply for a license to cut such timber.

Murphy & Wood, Solicitors for Plaintiffs, by Scott Wood.

[fol. 9] Herrd Northcutt, Solicitor for Defendant.

[fol. 10] EXHIBIT "A" TO STIPULATION

United States Department of Agriculture, Forest Service

17247

S
Sales—Quachita
Wilson Lumber Company
3-4-40
Hot Springs Working Circle
Reservoir Block I, Area B

3—328-329

Timber Sale Agreement

Forest Service, U. S. Department of Agriculture

M-5123 8-7417

[fol. 11] This page to be initialed by Mr. Wilson.

Form 202, Page 1 -Revised March 1927).

United States Department of Agriculture

8Afs—3348

S Forest Service W. W. W.

Sales—Ouachita

Wilson Lumber Company

3-4-40 Timber Sale Agreement

(Designation) Hot Springs Working Circle.

Reservoir Block I, Area B.

Description of Timber.—1. I, Warren W. Wilson, an individual doing business under the firm name of Wilson Lumber Company, having an office and principal place of business at Hot Springs, State of Arkansas, hereinafter called the purchaser, hereby agree to purchase from an area of about 2300 acres to be definitely designated on the ground by a Forest officer prior to cutting, in Sections 11, 12, 13, 14, 22, 23, 24, 26, 27, 28, 33 and 34, Township 1 South, Range 21 West, Fifth Principal Meridian, within the Ouachita National Forest, as definitely designated on the attached map which is hereby made a part of this agreement, (give also legal subdivision if surveyed, and approximate legal subdivisions if unsurveyed) at the rate or rates and in strict conformity with all and singular the requirements and conditions hereinafter set forth, all the dead timber standing or down and all the live timber marked or designated for cutting by a Forest officer, merchantable as hereinafter defined for sawlogs. (Name products to be cut, saw logs, ties, etc.)

Timber upon valid claims and all timber to which there exists valid claim under contract with the Forest Service is exempted from this sale. The estimated amount to be cut under the methods of marking described in Section 4 is

3,000 MBM log scale of shortleaf pine, (Give by species and quantity in proper unit of measure, state whether live or dead, and kind of material) more or less.

[fol. 12] Payments.—2. The purchaser hereby agrees to pay to the Regional Fiscal Agent, U. S. Forest Service, Atlanta, Georgia, or such other depository or officer as shall hereafter be designated, to be placed to the credit of the United States, for the timber at the following rates:

Form 202, Page 2 (Revised Mar. 1927).

Ten and 35/100 dollars ($10.35) per thousand feet b. m. (per thousand feet b. m., cords, linear feet, etc.)

Material unmerchantable on account of size, removed at the option of the purchaser, will be paid for at the same rate as merchantable material.

Payment shall be made in advance installments of not less than One Thousand dollars ($1,000.) and not more than Five Thousand dollars ($5,000.) each as determined by the Forest Officer in charge and when called for by him, except just before the completion of the sale when the amount of the payment may be reduced in writing by the Forest Supervisor, credit being given for the sums, if any, heretofore deposited with the United States depository or officer in connection with this sale.

Period of Contract.—3. Unless extension of time is granted, all timber shall be cut and removed and the requirements of this agreement satisfied on or before June 30, 1942. (Date)

Marking.—4. Live timber shall be marked for cutting as follows: Merchantable live timber shall be marked for cutting by paint spots below stump height or by blazing below stump height and stamping "U. S." upon the blaze at the option of the Forest Supervisor. All trees so marked shall be cut. Merchantable and shortleaf pine timber shall be cut whether marked or not. (insert suitable provision so that the system of cutting and method of designation will be clear)

4a. The system of marking has been indicated by sample [fol. 13] marking and accepted by the purchaser, and future marking shall follow the methods and principles so exemplified.

Form 202, Page 3 (Revised March 1927).

Merchantability.—5. Any tree which in the judgment of the Forest Officer contains one or more logs, merchantable as hereinafter defined, may be marked or designated for cutting as a merchantable tree.

6. All shortleaf pine logs are merchantable which are not less than 10 feet long, at least 8 inches in diameter inside bark at the small end, and after deductions for visible indications of defect scale 33⅓ percent of their gross scale; and have a net scale of at least 20 board ft.: Provided that firm red heart, sap stain and sound rich butts shall not be regarded as defects. (Name defects for which deductions will not be made in scaling.-

Material unmerchantable on account of defects may be removed without charge in the discretion of the Regional Forester.

Scaling.—7. Material shall be piled or skidded for scaling, measurement, or count if required by the Forest officer in charge and in such manner as he shall direct. The title to all timber included in this agreement shall remain in the United States until it has been paid for, and scaled, measured or counted.

Saw logs shall be scaled by the Scribner Decimal C log rule, at the small end on the average diameter inside bark taken to the nearest inch.

8. The maximum scaling length of saw logs shall be 16 feet; greater lengths will be scaled as two or more logs. Upon all logs 4 inches shall be allowed for trimming. Logs overrunning the specified trimming allowance shall be scaled not to exceed the next foot in length.

8a. Logging operations shall be so conducted as to permit [fol. 14] scaling to be done economically, and timber or logs from private or State land shall not be mixed at the point of scaling with timber or logs from government land.

8b. If required by the Forest Officer in charge, the purchaser shall plainly mark the length of each log on the small end with other than black crayon.

8c. Logs shall be arranged for scaling in connection with the use of any loading device in accordance with the directions of the Forest Officer in charge, in the manner most

practicable for the purchaser consistent with economical scaling by Forest Officers.

8d. Scaling shall be done as often as a minimum of 350 logs are available for scaling.

8e. On request, copies or abstracts of the scale reports will be furnished to the purchaser after they have been approved by the Supervisor.

Form 202, Page 4 (Revised Jan. 1937).

Logging.—As far as may be deemed necessary for the protection of National Forests interests, the plan of logging operations on the sale area shall be approved by the Forest Supervisor or by the officer to whom he may have delegated authority to give this approval. Operations begun on any natural logging area shall be completed in accordance with the terms of this agreement before cutting may begin on other areas, unless such cutting is authorized in writing in which event cutting shall be completed on the area left unfinished as soon as practicable. After decision in writing by the Forest officer in charge that the purchaser has complied satisfactorily with the contract requirements as to specified areas, the purchaser shall not be required to do additional logging or slash disposal work on such areas.

10. Any method of logging other than by means of animals, motor trucks and trailers or railroad may be employed only with the advance approval in writing of the [fol. 15] Forest officer approving this agreement and under such conditions and restrictions as he may require. (Indicate approved and expected methods as "horses and caterpillar tractors with not more than two tractors hauling to one loading place.")

11. As far as practicable all branches of logging shall keep pace with one another, and in no instance shall slash disposal be allowed to fall behind cutting, except when the depth of snow or other adequate reason makes proper disposal impracticable, when the disposal of slash may, with the written consent of the Forest officer in charge, be postponed until conditions are more favorable.

12. The purchaser shall cut all and only marked or designated live trees and shall remove all merchantable logs

from the sale area. No timber shall be cut until paid for, nor removed from the place or places agreed upon for scaling until scaled, measured, or counted by a Forest officer.

13. No unnecessary damage shall be done to young growth or to trees left standing. Unmarked or undesignated trees which are badly damaged in logging shall be cut if required by the Forest officer in charge.

14. On those portions of the sale area on which felling has been or is being done, marked or designated trees left uncut, and unmarked or undesignated trees which contain merchantable material and which are cut, injured through carelessness, or killed by fires which the purchaser, his employees, contractors, or employees of contractors caused, or the origin or spread of which he or they could have prevented, shall be paid for at double the current price, fixed by the terms of this agreement, for the class of material said trees contain: Provided, that such payment shall not release the purchaser from liability for any damage to the United States other than the value of said trees. Timber wasted in tops or stumps, marked or designated timber broken by careless felling, and any timber merchantable, [fol. 16] according to the terms of this agreement, which is cut and not removed from any portion of the cutting area when operations on such portion are completed, or before this agreement expires or is otherwise terminated, shall be paid for at the current price for such material. The amounts herein specified shall be regarded as liquidated damages and may be waived in the discretion of the Forest officer in charge in accidental or exceptional cases which involve small amounts of material. Unless extension of time is granted by the Forest Supervisor the right, title and interest to any timber for which payment has been made under the provisions of this section shall revert to the United States without compensation unless it shall have been removed from any portion of the sale area accepted by the Forest officer in charge within the 3 months next succeeding the date of such acceptance, or from the remainder of the sale area during the same number of months next succeeding the date of expiration or termination of this agreement.

15. Stumps shall be cut so as to cause the least practicable waste, and not higher than 12 inches on the side adja-

cent to the highest ground, except that when this requirement is impracticable in the judgment of the Forest officer, he may authorize or accept higher stumps; all trees shall be utilized to as low a diameter in the tops as practicable and to a minimum diameter of 8 inches when merchantable. The log lengths shall be varied so as to secure the greatest possible utilization of merchantable material. (Specify different diameters for different species, if necessary.)

15a. Trees may be long butted sufficiently to remove material unmerchantable under the terms of this agreement for sawlogs.

Form 202, Page 5 (Revised Mar. 1927).

[fol. 17] Brush Disposal.—16. Slash shall be disposed as follows:

Tops of all shortleaf pine trees shall be lopped so that all limbs and material four inches and over in diameter at the large end shall be close to the ground, and material less than four inches in diameter at the large end shall be scattered evenly over the ground and not over eighteen inches deep, but no material shall be left within four feet of living trees of merchantable species, as required by the Forest officer in charge.

Form 202, Page 6 (Revised Mar. 1927).

Fire precautions.—17. During the time that this agreement remains in force the purchaser shall independently do all in his power to prevent and suppress forest fires on the sale area and in its vicinity, and shall require his employees, contractors, and employees of contractors to do likewise. Unless prevented by circumstances over which he has no control, the purchaser shall place his employees, contractors, and employees of contractors at the disposal of any authorized Forest officer for purpose of fighting forest fires, with the understanding that unless the fire-fighting services are rendered on the area embraced in this agreement or on adjacent areas (Describe by topographic features or as a belt of a specified width around the sale area) within one-half mile of the exterior boundary of the sale area, shown on the attached map, which is a part of this agreement, payment for such services shall be made at rates to be determined by the Forest officer in charge, which rates shall not be less than the current rates of pay

prevailing in the said National Forest for services of a similar character: Provided, that the maximum expenditure for fire fighting without remuneration in any one calendar year, including the furnishing of special trains and other special service as required at rates of pay determined as above, shall not exceed $300.00; And provided [fol. 18] further, That the purchaser, his employees, contractors, or employees of contractors caused or could have prevented the origin or spread of the said fire or fires, no payment shall be made for services so rendered, nor shall the cost of such services be included in determining said maximum expenditure for any calendar year.

18. Except in serious emergencies as determined by the Forest Supervisor the purchaser shall not be required to furnish more than 6 men for fighting fires outside of the area above specified, and any employees furnished shall be relieved from fire fighting on such outside areas as soon as it is practicable for the Forest Supervisor to obtain other labor adequate for the protection of the National Forest.

19. During periods of fire danger, as may be specified by the Forrest officer in charge, the purchaser shall prohibit smoking and the building of camp and lunch fires by his employees, contractors, and employees of contractors within the sale area except at established camps, and shall enforce this prohibition by all means within his power: Provided, That the Forest officer in charge may designate safe places where, after all inflammable material has been cleared away, camp fires may be built for the purpose of heating lunches and where, at the option of the purchaser, smoking may be permitted.

19a. During periods of exceptional emergency, created by hazardous climate conditions or otherwise, the Forest Supervisor, or officer to whom he may have delegated authority for this purpose, shall require such additional patrols or other emergency measures as he may determine to be necessary to meet the situation, which requirements, as far as practicable, shall be set forth in the fire plan for the sale area; and if, in the judgment of the Forest Supervisor, other precautions are not adequate, or if the operator shall [fol. 19] not comply with the emergency measures required, the Supervisor or other authorized officer shall have au-

thority to close down such machines or such portions of the logging operations as, in his judgment, should be discontinued during the period of the emergency or until the emergency requirements are met by the operator.

19b. During such periods as the Forest Officer in charge may specify, no camp refuse, or brush, slash or debris, such as that resulting from clearing around camps or on rights-of-way, shall be burned without consent of the Forest Officer in charge.

19c. The purchaser shall furnish and shall maintain suitable sealed boxes each containing: 1 Axe DB, 6 Potato Hooks or Council Rakes, 6 large pails or buckets, 1 four-quart canteen, 1 five-gallon spray pump, 1 shovel, 1 lantern, 1 extra globe, 1 gallon kerosene, at each camp used in logging the timber covered by this agreement. The purchaser shall also furnish and maintain suitable sealed tool boxes each containing the tools listed above, in such numbers and so located that no crew of 6 or more men will be working at any time at a distance of more than one-half mile from a tool box. Each locomotive, loader or other steam logging engines used in logging or construction work in connection with this sale shall be equipped with suitable sealed tool boxes each containing the tools listed above. The said tools shall not be used for any purpose except fighting forest fires, and shall be kept in serviceable condition. The boxes shall be plainly marked with paint to indicate that the tools in them are to be used for no other purposes except fighting forest fires.

Form 202—Page 6a.

19d. A spark arrester satisfactory to the Forest Officer in charge shall be maintained on the stack of the sawmill boiler during such periods as he may require. The mill [fol. 20] site and the ground for a distance of 200 feet from the marginal limits thereof shall be cleared of all inflammable material, including dead trees, before the mill is set up and thereafter this space shall be kept clear of all brush, dry grass or other inflammable material other than sawed products, so long as the mill operates. Slabs, if not burned or hauled away currently, shall be placed sufficiently apart from the sawdust, in the judgment of the Forest Officer in charge, so that they can be burned separately, and shall

be burned as and when directed by the Forest Officer in charge and not otherwise.

Form 202—Page 7 (Revised Mar. 1927).

Occupancy and Improvements.—The purchaser is authorized to build, on National Forest land, sawmills, camps, railroads, roads, and other improvements necessary in the logging or the manufacturing of the timber included in this agreement: Provided, That all such structures and improvements shall be located and operated subject to such regulations by the Forest officer in charge as may be necessary for the protection of National Forest interests. The continuance or operation of such improvements on National Forest land after this agreement has terminated shall be subject to authorization by permit or easement under United States laws, and unless such authorization is secured all improvements not removed shall become the property of the United States at the expiration of six months from the termination of this agreement.

21. All merchantable Shortleaf Pine Timber used in the construction of buildings, roads, and other structures, necessary in connection with the cutting and removal of the timber covered by this agreement, shall be paid for at the current rates for such material under this agreement.

22. The purchaser shall keep all logging camps, mills, [fol. 21] stables, and other structures used in connection with this sale, and the ground in their vicinity, in a clean, sanitary, condition, and rubbish shall be removed and burned or buried. When camps or other establishments are moved from one location to another or abandoned, the purchaser shall burn or otherwise effectively dispose of all debris and abandoned structures.

23. All telephone lines, ditches, and fences, located within or immediately outside the exterior boundaries of the sale area, shall be protected so far as possible in logging operations and, if injured, shall be repaired immediately by the purchaser, and the Forest Supervisor may, when in his judgment it is necessary, require the purchaser to move any such telephone line or fence from one location to another. Roads and trails shall at all times be kept free of logs, brush, and debris resulting from the purchaser's operations hereunder, and any road or trail used by the pur-

chaser in connection with this sale that is damaged or injured beyond ordinary wear and tear through such use shall promptly be restored by him to its original condition.

23a. All camp buildings and structures used in connection with this sale shall be located and operated as may be required by the Forest Officer in charge to prevent the pollution of the water in any stream. Outhouses, toilets and garbage pits shall be constructed and maintained so as to prevent, so far as is possible, the breeding of flies or the development of insanitary conditions.

23b. The purchaser agrees to employ at all mills on privafe land supplied wholly or in part with timber cut under this agreement, and at all camps on private land maintained in connection with the performance of this agreement, such fire control and sanitation devices and measures as are being required in connection with similar improvements located on National Forest land, such devices [fol. 122] and measures to be subject to the approval of the Forest Officer in charge.

23c. Merchantable post oak, black oak, red or black gum and unmerchantable tops of other species may be used without charge, for the construction of buildings, roads and other structures necessary in connection with the cutting and removal of the timber covered by this agreement. Timber used for such improvements will be left in place where used.

24. Other Conditions. (Insert other conditions if any are necessary) In order to check the spread of tree disease and to improve the cond-tion of the stand, the purchase shall cut all dead and diseased trees marked or designated for cutting on the s-ale area whether merchantable or apparently unmerchantable. Such trees after felling shall be opened sufficiently to satisfy the Forest Officer in charge of their contents and any portions thereof which are merchantable shall be scaled and paid for and may be removed by the purchaser.

Form 202—Page 8 (Revised September 1936).

25. Exchanges of Land and Timber.—The purchaser, desiring to cooperate with the Department of Agriculture in carrying out the purposes of the act of Congress approved

March 20, 1922 (42 Stat. 465), and other land-exchange acts of like purpose, agrees that any portion of the timber covered by this agreement may, in the discretion of the Secretary of Agriculture, be granted to a third party in exchange for private lands conveyed to the United States under said acts where such party agrees to sell timber to said purchaser at the prices stipulated in this agreement or which may have been established in accordance with its terms; and further agrees that in such event he will purchase said timber from the party to whom granted at the price or prices per thousand board feet, or other unit of measurement stipulated in this agreement or which may have been established in accordance with its terms, and will [fol. 23] cut and remove such timber and dispose of the slash therefrom in strict accordance with the requirements and provisions of this agreement; it being mutually understood and agreed that all timber so cut and removed shall be credited against the maximum or minimum periodic cuts prescribed by section 3 of this agreement. Payment for such timber sh-ll be remitted to the regional fiscal agent of the Forest Service, at Region 8, Atlanta, Ga. or other designated depository, upon notification by the Forest Supervisor and in the amounts not exceeding the maximum established by section 2 of this agreement. If title to the conveyed land is finally accepted by the Secretary of the Interior the said fiscal agent will pay to the owner of said land the amount deposited to cover the value of the timber granted in lieu thereof, but if title to the conveyed land is not accepted by the Secretary of the Interior the said fiscal agent will credit the amount deposited to this timber sale as a payment. All privileges of selecting, cutting, and removing timber covered by this agreement, which by this section are conceded to third parties, shall be equally available to the purchaser under the terms and conditions set forth herein, except that prior deposit of the value of the selected timber shall not be required in cases where the purchaser is also the owner of the conveyed land unless the purchaser desires to cut and remove the selected stumpage before title to the conveyed land is finally accepted by the Secretary of the Interior, in which event the value of the timber to be cut must be deposited as in the case of third parties but will be refunded or applied as a timber-sale payment if and when the exchange is consummated by acceptance of the offered land.

Form 202—Page 9 (Revised March 1938).

(In the following sections, continue the numbering serially [fol. 24] from the last number used on the preceding page.)

26. At all times when logging operations are in progress the purchaser shall have at the main camp for his employees working on the scale area, a representative who shall be authorized to receive, on behalf of the purchaser, any or all notices and instructions in regard to work under this agreement given by the forest officer in charge, and to take such action thereon as is required by the terms of this agreement.

27. Complaints by the purchaser as to any action taken by a forest officer respecting this agreement shall not be considered unless made in writing within thirty (30) days of such action to the Forest Supervision having jurisdiction. The decision of the Secretary of Agriculture shall be final in the interpretation of the regulations and provisions governing the sale, cutting and removal of the timber covered by this agreement.

28. All operations on the sale are, including the removal of scaled timber, may be suspended by the forest officer in charge, in writing, if the conditions and requirements contained in this agreement are disregarded, and failure to comply with any one of said conditions and requirements, if persisted in, shall be sufficient cause for the termination of this agreement: Provided, That the Chief, Forest Service, may, upon reconsideration of the conditions existing at the date of sale and in accordance with which the terms of this agreement were fixed, and with the consent of the purchaser, terminate this agreement, but in the event of such termination the purchaser shall be liable for any damages sustained by the United States arising from the purchaser's operations hereunder.

29. All records pertaining to the purchaser's logging operations and milling business shall be open to inspection at any time for a forest officer authorized by the Regional Forester to make such inspection, with the understanding [fol. 25] that the information obtained shall be regarded as confidential.

30. The term "officer in charge", whenever used in this agreement signifies the officer of the Forest Service who

shall be designated by the proper supervisor to supervise the timber operations in this sale.

31. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, and either before or after he has qualified, and during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company. (Sec. 3741, Rev. Stat., And Secs. 114-116, act of Mar. 4, 1909.)

32. This agreement shall not be assigned in whole or in part.

33. The conditions of the sale are completely set forth in this agreement, and none of its terms can be varied or modified except in writing by the forest officer approving the agreement or his successor or superior officer, and in accordance with the regulations of the Secretary of Agriculture. No other forest officer has been or will be given authority for this purpose.

34. And as a further guarantee of a faithful performance of the conditions of this agreement, the purchaser delivers herewith a bond in the sum of twenty-five hundred dollars ($2,500.00), and further agrees that all moneys paid under this agreement shall upon failure on his part to fulfill all and singular the conditions and requirements herein set forth, or made a part hereof, may be retained by the United States to be applied as far as may be to the satisfaction of his obligations assumed hereunder. The purchaser further agrees that should the sureties on the [fol. 26] bond delivered herewith or on any bond delivered hereafter in connection with this sale become unsatisfactory to the officer approving this agreement, the purchaser will, within thirty (30) days of receipt of demand, furnish a new bond with sureties solvent and satisfactory to the approving officer.

35. Signed in triplicate this 28th day of February, 1940.

(Same date as bond.)

(Corporate seal, if corporation.)

[fol. 27] IN THE CHANCERY COURT OF GARLAND COUNTY

No. 17,247

WARREN W. WILSON, et al, Plaintiff,

MARION ANDERSON, SHERIFF, et al, Defendants

DECREE—June 27, 1944

On this 27th., day of June, 1944, come the plaintiff by their Solicitors, Murphy & Wood, and comes Murray B. McLeod, Commissioner of Revenues of the State of Arkansas by his Solicitor, Herrn Northcutt; and it appearing to the court that due service of process by summons issued on the complaint herein for the time and in the manner prescribed by law against the defendants, John E. Jones as Clerk of the Circuit Court of Garland County, Arkansas, and Marion Anderson as Sheriff of Garland County, Arkansas, has been made in this cause; and this cause, being reached on the regular call of the calendar, is submitted to the court for its consideration and judgment upon the complaint of the plaintiffs, the motion and intervention filed by Murray B. McLeod, Commissioner of Revenues of the State of Arkansas, answer of Murray B. McLeod, Commissioner of Revenues of the State of Arkansas, the depositions of Warren W. Wilson, taken on behalf of the plaintiffs, dated February 10, 1944, the deposition of J. D. Waldrip, taken on behalf of the defendant, dated February 21, 1944, the stipulation made by the Solicitors of the parties hereto and filed on February 1, 1944, and the affidavit of Warren W. Wilson, dated April 19, 1944, with the stipulation attached thereto. The court being well and sufficiently advised as to all matter of law and fact arising herein, finds:

[fol. 28] That the Arkansas severance tax, if it be applied to timber severed from the National Forest pursuant to agreements such as those introduced in evidence in this cause between the United States and the persons severing said timber, would be a tax upon the operations of the Government of the United States and a tax on the right of the United States to harvest the mature timber on its national forest; and the Arkansas severance tax does not apply to the timber severed by the plaintiffs from the National Forest.

The court does, therefore, consider, order, adjudge and decree that the certificate filed by the Commissioner of Revenues of the State of Arkansas in the office of the clerk of the Circuit Court of Garland County, Arkansas, claiming that the plaintiffs are endebted to the State of Arkansas for severance tax for timber severed by the plaintiffs is void; that the execution issued upon the said certificate by the clerk of the Circuit Court of Garland County, Arkansas, is void; and that said certificate and execution are canceled and set aside.

To the findings and the ruling of the court, the defendants timely objected and excepted and had same noted of record and then prayed an appeal to the Supreme Court of Arkansas, which is by the court granted.

[fol. 29] IN THE SUPREME COURT OF ARKANSAS

COOK, COMMISSIONER OF REVENUES v. WILSON

OPINION—April 2, 1945

McFADDEN, J.:

The question presented is whether the state may collect from the purchaser and severer the severance tax on timber cut from lands belonging to the United States in a national forest.

Appellees are partners trading under the firm name of Wilson Lumber Company; and at various times they have severed timber in the United States national forest under "Timber Sale Agreement" with the United States Department of Agriculture. One such agreement was introduced; it is quite lengthy, but the salient provisions are: (1) The "purchaser" (appellee) agreed to purchase from a certain area in the national forest "all of the dead timber standing or down and all of the live timber marked or designated for cutting for a forest officer, merchantable as hereinafter defined for saw logs." (2) Merchantable live timber was to be marked for cutting by paint spots. (3) The purchaser agreed to deposit certain sums of money with the United States depository, to be credited against the purchase of the timber in the agreement; and the purchase price was $10.35 per thousand feet board measure. (4) After the

timber was cut, the logs were to be arranged for scaling as often as a minimum of 350 logs was available; and when scaled, and the price of the particular lot determined, then the price of that lot was to be charged against the deposit made by the purchaser to the depository as previously mentioned. (5) The agreement recited that "the title to all timber included in this agreement shall remain in the United States until it has been paid for, and scaled, measured or counted." And, furthermore, that "no timber shall be cut until paid for, nor removed from the place or places agreed upon for scaling until scaled, measured or counted [fol. 30] by a forest officer." (6) In addition to cutting removing, and paying for the merchantable timber, the purchaser was also, under supervision of the forest officer, to cut and remove all dead or diseased timber, and dispose of it, from the acreage involved in the contract; and the purchaser was to participate, by payments and/or man power, in fighting forest fires. The logging camp and details of operation were prescribed in the contract. The purchaser, furthermore, made a fidelity bond for the faithful performance of the contract.

The Commissioner of Revenues filed his certificate in Garland County (Sec. 13384 Pope's Digest) claiming that the appellees owed the State of Arkansas the severance tax (and penalty) on the timber cut and removed by the appellees from the national forest under the said Timber Sale Agreement. The appellees filed suit in the Garland Chancery Court to enjoin the sheriff from serving execution issued on the certificate, and appellees claimed immunity from the tax because the timber came from lands of the national forest. The State Commissioner of Revenues intervened as a defendant in the suit, and sought to sustain the tax. The chancery court denied the claim of the state to collect the severance tax, and this appeal challenges that decree and presents the points herein discussed.

I. *Was the Arkansas Severance Tax law Intended to Apply to Persons Severing Timber from Lands of the United States in a National Forest?* We answer this question in the affirmative. The original severance tax act was Act 118 of 1923. It has been frequently amended, and some of the amendatory acts are: Act 283 of 1929, Acts 116 and 138 of 1933, and Act 158 of 1937. The act, with amendments, may be found in Section 13371 *et seq.* of

Pope's Digest. Briefly, the Act: (1) Levies a tax on the business of severing timber (Section 13371; (2) requires the severer or "producer" to obtain a permit from the state, and make regular reports (Section 13372); (3) provides [fol. 31] that the tax shall remain a lien on each unit of production, and the tools and equipment used in the severing (Sections 13372 and 13376); (4) requires the reporting taxpayer to withhold the tax from the proceeds of the severed products (Section 13382); (5) provides that the severed resources shall not be removed until the tax is paid (Section 13386).

The act contains only two exemptions, to wit: (1) Section 13374 provides that the act shall not apply to any individual owner of timber "who occasionally severs or cuts from his own premises such stocks, logs, poles, or other forest products, as are utilized by him in the construction or repair of his own structures or improvements, the purpose of this clause being to exempt therefrom such severers as utilize forest products to their own personal use, and not for sale, commercial gain, or profit." (2) Section 13375 provides an exemption "that no tax herein levied shall apply to the producer of switch ties, who hews out or makes such switch ties entirely by hand."

These are the only two exemptions found in the Severance Tax Law. The listing of these two exemptions necessarily excluded all other exemptions under the well known rule of *expressio unius est exclusio alterius.* St. L. I. M. & S. Ry. v. Branch, 45 Ark., 524; Chisholm v. Crye, 83 Ark. 495, 104 S. W. 167; 25 C. J. 220; 59 C. J. 984, 50 Am. Juris. 455. We reach the conclusion that the act levies a uniform tax on the business of severing timber in all instances except the two exemptions mentioned, and therefore it was the intent of the Legislature to apply the law to all other cases; and the tax would apply to the case at bar, as the transaction here involved does not come within either exemption.

II. *Does the Immunity of a Federal Government Instrumentality Inure to the Benefit of the Appellees?* It is fundamental that the Federal Government and its instrumentalities are exempt from state taxation. McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank of U. S., 9 Wheat. 738; Thompson v. U. P. R. R. 9 Wall (U. S.) 579; Weston v. [fol. 32] Charleston, 2 Pet. 449; Pollock v. Farmers Loan & Trust Co., 157 U. S. 429. On the other hand, the tax

immunity does not insure to a person, firm, or corporation merely because such claimant has a contract with, or a grant from, the Federal Government. Groves v. New York, 306 U. S. 466, 83 L. Ed. 927; James v. Dravo Construction Co., 302 U. S. 134, 82 L. Ed. 155; Silas Mason Co. v. Tax Commission of Washington, 302 U. S. 186, 82 L. Ed. 187; Alabama v. King, 314 U. S. 1, 86 L. Ed. 3; Penn. Dairies v. Milk Control Commission, 318 U. S. 261, 87 L. Ed. 748; Fox Film Co. v. Doyal, 286 U. S. 123, L. Ed. 1010.

Prior to James v. Dravo, supra, decided December 6, 1937, a tax like the one at bar might not have been sustained, because in Graves v. Texas., 298 U. S. 393, 80 L. Ed. 1236, and other cases, any effort to levy a tax that would ultimately fall on the Federal Government had been defeated. As was said by Mr. Justice Roberts in his dissenting opinion in James v. Davo, supra, that case marked a radical departure from previous decisions. So we start with James v. Davo, supra, and the companion case of Mason v. Washington, 302 U. S. 186, 82 L. Ed. 187, decided on the same day, as the beginning of the present rule of taxation in a case like the one at bar; and this rule is emphasized by Alabama v. King, supra, decided November 10, 1941.

In James v. Dravo, supra, the Supreme Court of the United States upheld the Gross Sales and Income Tax Law of West Virginia, which levied an annual privilege tax "on account of business and other activities." The tax was on the business of contracting, and was 2% of the gross income. The Dravo Construction Company was a Pennsylvania corporation domesticated in West Virginia, and engaged in four contracts with the United States for the construction of locks and dams on the Ohio and Kanawha Rivers. The Supreme Court of the United States said that there were two questions: (1) whether the state had [fol. 33] territorial jurisdiction to impose the tax, and (2) whether the tax was invalid as laying a burden on the operations of the Federal Government.

(1) As to territorial jurisdiction, the court held that the State of West Virginia still had the right of taxation on activities located on the lands acquired by the United States by purchase or condemnation for the purpose of the improvement, reasoning: that even though the State of West Virginia had agreed to the U. S. Government's acqui-

sition of title to the land, nevertheless, the State of West Virginia still retained its residuum of legislative jurisdiction; and that the United States held lands within the State for public purposes, but that ownership did not withdraw the lands from the jurisdiction of the State. Emphasis was placed on the terms of cession. It was pointed out that the State, in reserving the right to issue process, did not lose the right to tax an independent contractor; and that the Dravo Construction Company was an independent contractor, and could be taxed with respect to its activities carried on on the lands owned by the United States.

(2) As to whether the tax was invalid, as a burden on the Federal Government, the court held that the Dravo Construction Company was an independent contractor, that the tax was not laid on the contract of the *u*nited States, but was laid on the business of the Dravo Construction Company, and that the West Virginia tax, so far as it was laid upon the gross receipts of the Dravo Construction Company, did not interfere in any substantial way with the performance of the Federal Government, and was a valid exaction.

In Mason v. Washington, supra, the tax was practically the same: a tax on a contractor engaged in building the Grand Coulee dam on the Columbia River. The tax was called an occupation tax. In that case the United States Government had acquired title to approximately 840 acres, and all of the work of the Mason Company was on that land. But the court held that when the United States ac- [fol. 34] quired title to the land, it did not deprive the state of its residuum of legislative authority. The court uses these words:

"The question * * * is whether the United States has acquired exclusive legislative authority so as to debar the State from exercising any legislative authority in- including its taxing and police power in relation to the property and activities of individuals and corporations within the territory. The acquisition of title by the United States is not sufficient to affect that exclusion. It must appear that the State, by consent or cession, has transferred to the United States that residuum of jurisdiction which otherwise it would be free to exercise." The court held that

when the United States acquired the lands, the State of Washington did not lose the residuum of jurisdiction.

We proceed now to test the case at bar against: (A) territorial jurisdiction, and (B) burden on government operations, as outlined in the two cases from the United States Supreme Court just mentioned.

(A) *Territorial Jurisdiction.* The federal legislation covering national forests is found in U. S. C. A. Title 16, Section 471, et seq. The federal statutes show that national forests are established in two ways: (a) by presidential proclamation declaring certain lands of the public demain to be a national forest. This is under Section 471 and only includes lands that had never passed from the United States. (See Light v. U. S., 220 U. S. 523, 55 L. Ed. 570.) (b) The purchase or acquisition of other lands under Section 516. These lands are acquired by the Federal Government only after the Legislature of the State has consented to such acquisition. This Section 516 is the Act of Congress of March 1, 1911.

Regarding timber severed from lands incorporated into the national forest by presidential proclamation under Section 471, 34 hold that the State has no right to collect [fol. 35] the severance tax because the State never had the "residuum of jurisdiction," as that language is used in the cases of James v. Dravo and Mason v. Washington, supra. Appellant claims that U. S. C. A. Title 16 Section 480 gives the State the right to impose the tax in such a case. We construe that Section as allowing civil and criminal jurisdiction, but not allowing taxation.

Regarding timber severed from lands incorporated into the national forest by *acquisition* under Section 516, we hold that the State has the right to collect the severance tax, so far as territorial jurisdiction is concerned, because the State has the "residuum of jurisdiction." The Arkansas Legislature, by Act No. 148 of 1917, and by Act No. 108 of 1927 (see Sections 5656-7 Pope's Digest), gave the consent of the State of Arkansas to the acquisition by the United States of lands for the establishment, consolidation, and extension of national forests as provided by the Act of Congress of March 1, 1911, "provided, that the State of Arkansas shall retain a concurrent jurisdiction with the United States in and over lands so acquired so far that

civil process in all cases, and such criminal process as may issue under the authority of the State of Arkansas against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this act had not been passed." A comparison of Section 5656-7 of Pope's Digest with the West Virginia statutes shown in the case of James v. Dravo, supra, leads to the inevitable conclusion that the State of Arkansas still retains its residuum of jurisdiction over lands that became a part of the national forest under U. S. C. A. Title 16 Section 516.

Appellees, in their claim for tax immunity, cite C. O. & G. Ry. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234, and Oklahoma v. Barnsdall, 296 U. S. 521, 80 L. Ed. 366. Each of these cases involved a severance tax levied by the State [fol. 36] of Oklahoma on minerals from Indian lands, and in each case the tax was not permitted. We distinguish these cases in two ways, (1) these cases were decided prior to James v. Dravo, and (2) in these cases, the minerals were held by the United States government as a trustee for Indian tribes. The State of Oklahoma had never ceded the lands to the United States government, and therefore has no "residuum of legislative authority." The original title was in the United States as trustee for the Indians, and that original title in the United States prevented the State from exercising any tax rights without the permission of the United States.

(B) *Burden on Governmental Operations.* In their claim that no tax is due the State, appellees contend that cutting the timber was a federal matter, and the appellees operated as a federal instrumentality, and to impose a tax upon the appellees would be an indirect tax on a federal operation or instrumentality. We hold that the appellees, in cutting and removing the timber, acted as independent purchasers, and not as a government instrumentality, and that this is not a tax on governmental operations. In James v. Dravo, supra, and in Mason v. Washington, supra, the construction company was in each instance an independent contractor, and the tax was permitted. In Alabama v. King, supra, the contractor was buying supplies on a "cost-plus" contract, and a state sales tax was held to be collectible. In each case the claim for tax immunity was the same as the claim made by the appellees in the case at bar.

Here the appellees were outright purchasers and severers, and therefore far more distinctly independent than were the contractors taxed in the cases just mentioned.

The Arkansas severance tax is a privilege tax or license tax; and is levied on the business of severing. Section 13371 Pope's Digest; Floyd v. Miller Lumber Co., 160 Ark. 17, 254 S. W. 450; same case on second trial, 169 Ark. 473, 275 S. W. 741; McLeod, Commissioner v. K. C. S. R., 206 Ark. 281, 175 S. W. 2d 391.

[fol. 37] The Arkansas severance tax is in no sense an ad valorem tax, so the case of U. S. v. Alleghany County, 322 U. S. 186, 88 L. ed. (adv. opn.) 845 has no application. The Arkansas severance tax is nondiscriminatory, as has been previously shown. It taxes, alike, all who sever timber for commercial gain, just as the appellees do here, since they are engaged in the lumber business. In the case of Buckstaff Co. v. McKinley, 198 Ark. 91, 123 S. W. 2d 802, there was an effort to avoid a state tax, on the plea of governmental agency, and we said:

"Imposition of the tax here does not, in any sense, interfere with the government's business."

The United States Supreme Court, in affirming the case (308 U. S. 358, 84 L. ed. 322) said:

"The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter."

In James v. Dravo, supra, the Court quoted from F. & D. Co. v. Pennsylvania, 240 U. S. 318, 60 L. ed. 664:

"Mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from state control."

See also Collins v. Yosemite, 304 U. S. 518, 82 L. ed. 1502. So we hold that the appellees are not entitled to claim any tax immunity as a governmental instrumentality, or because of governmental operations, and are liable for severance tax on all timber cut from land that became a part of the national forest by governmental acquisition under U. S. C. A. Title 16 Section 516.

III. *Was There any Ruling by the State Revenue Commissioner that Now Prevents the State from Enforcing the State Severance Tax?* Finally, appellees argue that the State should not now be allowed to collect the severance tax on timber cut from any lands in a national forest, because from 1923 to 1939 the State made no effort to collect any such [fol. 38] tax from these appellees. No ruling of the Commissioner of Revenues is pleaded or proved, but it is argued that the failure of the State to make earlier demands now operates as a bar against the present demand. Executive construction of a statute is entitled to consideration by the courts, and should not be disregarded except for cogent reasons, or unless clearly erroneous. 59 C. J. 1027; 25 R. C. L. 1045; 42 Am. Jurs. 392 et seq.; Moses v. McLeod, 180 S. W. 2d 110. But there are several reasons why appellees cannot sustain their contention about an executive construction:

In the first place, no affirmative ruling of the Commissioner of Revenues was pleaded or proved. The most that the appellees claimed was that *they* had not paid the tax from 1923 to 1937. Whether other persons similarly situated had paid the tax was not shown. The failure of the Commissioner of Revenues to pursue appellees earlier cannot be used as a defense when suit is undertaken within the period of limitations. Secondly, if there had been an administrative ruling, it would yield to a judicial construction, when the ruling was shown to be erroneous. As stated in Am. Juris. 398:

"A construction of doubtful correctness may be sustained, but one manifestly wrong or clearly erroneous cannot be upheld." Thirdly, from the passage of the Severance Tax Law in 1923 until the decision by the United States Supreme Court in James v. Dravo, supra, in 1937, the State Commissioner of Revenues might have thought that liability would not be sustained because of decisions of the United States Supreme Court in cases like Green v. Texas Co., 298 U. S. 393, 80 L. ed. 1236, and such earlier cases as Dobbins v. Erie County, 16 Peters 435, 10 L. ed. 1022; Collector v. Day, 11 Wallace 118, 20 L. ed. 122. The tax had all the time been levied by legislative action, but remained uncollected. The innovation of the decision of [fol. 39] James v. Dravo, supra, is pointed out by Mr. Justice Roberts in his dissenting opinion. The State of Ar-

kansas should not now be deprived of its tax because the Commissioner of Revenues failed for a number of years to collect the tax, not anticipating the decision of the United States Supreme Court in James v. Dravo, supra. Finally no administrative ruling of the Commissioner of Revenues of the State of Arkansas (and none has been shown) has worked prejudice to the appellees in the case at bar, because the tax here involved originated by reasons of transactions in 1940, and any delay from 1923 to 1937 has not prejudiced the appellees regarding a 1940 tax liability.

To Summarize and Conclude, we hold:

1. That the appellees are not liable to the State for severance tax on timber severed by them from lands held by the United States as original owner (U. S. C. A. Title 16 Section 471); and to that extent the decree of the chancery court is affirmed;

2. That the appellees are liable to the State of Arkansas for severance tax and penalty on all timber severed by them from lands acquired by the United States under the Act of Congress of March 1, 1911 (U. S. C. A. Title 16 Section 516). The stipulation in the record in this case shows that such severance tax and penalty is $276.35; and the decree of the chancery court as to this, is reversed, and decree is rendered here for the State of Arkansas and against the appellees for said amount of $276.35 with interest from this date until paid.

The Chief Justice dissents as to the reversal.

[fol. 40] IN THE SUPREME COURT OF ARKANSAS

JUDGMENT—April 2, 1945

This cause having heretofore been decided by the Court on February 19, 1945, and the opinion delivered on that day withdrawn on the Court's own motion, and the judgment entered upon the opinion set aside,

Now on this day the Court hands down a new opinion and the following judgment is entered thereon, to wit:

This cause came on to be heard upon the transcript of the record of the chancery court of Garland County and was argued by solicitors, on consideration whereof it is the opinion of the court that there is no error in so much of the

proceedings and decree of said chancery court as held that the appellees are not liable to the State for the severance tax on timber severed by them from lands held by the United States as original owner.

It is therefore ordered and decreed by the court that so much of said decree be and the same is hereby affirmed with costs.

But it is further the opinion of the court that there is error in so much of the decree of said chancery court in this cause as held that appellees were not liable to the State for severance tax and penalty on all timber severed from lands acquired by the Government under Act of Congress of March 1, 1911, and so much of said decree is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and it appears that the parties have stipulated that if there is any tax liability for timber severed from lands held by the United States by acquisition, then such liability is $276.35.

It is therefore ordered and decreed by the court that the appellant recover of said appellees, the sum of Two Hundred Seventy Six Dollars and Thirty Five Cents ($276.35), with interest on said sum at the rate of 6% per annum from this date until paid.

It is further ordered and decreed that said appellant [fol. 41] recover of said appellees all his costs in this court, in this cause expended, and have execution thereof. Griffin Smith, C. J., dissents as to the reversal.

[fol. 42] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR REHEARING—Filed March 8, 1945

Come the appellees, Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, and petition the court to reconsider the opinion rendered herein on the 19th day of February 1945, and grant a rehearing of this cause for the following reasons:

I

The court erred in holding that the tax was not a direct tax on the United States.

II

The court erred in holding that the tax did not interfere with the government's business.

III

The court in its opinion herein indicates that both the legislative and executive departments of the State of Arkansas, prior to the decision in James v. Dravo Construction Company, 302 U. S. 134, which was decided December 6, 1937, construed the severance tax law as not applying to timber severed from the United States national forests. The opinion also indicates that such was the general opinion with respect to the application of the severance tax law. The court, therefore, erred in holding that the severance tax statute does apply to the timber severed in the national forests.

IV

The court, in its opinion, holds that severance tax applies to timber severed from lands within the national forests which were acquired by the United States by purchase with the consent of the state, and that it does not apply to timber severed from lands held by the United [fo 43] States as original owner. The certificate filed by the state in the office of the clerk of the Circuit Court of Garland County does not allege that any of the timber which is included in the certificate was severed from lands which were acquired by the United States under the provisions of Title 16, Section 516, U. S. C. A. Since the state does not claim that the timber was severed from the lands which were acquired by the United States by purchase with the consent of the state, the state is not entitled to have an execution issued on its claim; and the Chancery Court of Garland County properly enjoined the sheriff from levying the execution upon appellees' property.

For the reasons stated above, the appellees petition the court to reconsider the opinion heretofore rendered in this cause, and to affirm the decree of the chancery court of Garland County. But if the court holds that the decree should not be affirmed in its entirety, appellees petition the court to affirm the decree of the chancery court of Garland County insofar as it enjoins the sheriff from levying execu-

tion on appellees' property and remand the cause, with directions to permit the appellant to amend its claim and certificate filed in the office of the clerk of the circuit court of Garland County, by stating what it claims as severance tax on account of timber severed from lands which were purchased by the United States with the consent of the state.

Respectfully submitted, Scott Wood, Solicitor for Appellees.

CERTIFICATE OF COUNSEL

Scott Wood states that he is the solicitor for the appellees, and believes that the foregoing petition for rehearing should be granted.

Scott Wood.

[File endorsement omitted.]

[fol. 44] IN THE SUPREME COURT OF ARKANSAS

ORDER OVERRULING PETITION FOR REHEARING—May 14, 1945

Rehearing Petitions Denied: Being fully advised, the petitions for rehearing in the following causes, are by the court severally overruled, viz:

No. 7527—Otho A. Cook, Commr. v. Warren W. Wilson, et al.

[fol. 45] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR APPEAL—Filed July 6, 1945

Considering themselves aggrieved by the final decision of the Supreme Court of the State of Arkansas in the above entitled cause, the appellees therein, Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo, and Lelia F. Craigo, pray that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

Assignment of Errors.

Now come the appellees above named and file herewith their petition for an appeal and assign as error:

1. The Supreme Court of Arkansas erred in giving judgment reversing the judgment of the Chancery Court of Garland County, Arkansas, which held to be void the severance tax statute of the state of Arkansas, which laid a tax for the privilege of severing timber from the United States National Forests, while title to the said timber was in the United States, which act also required the persons having contracts with the United States for severing the said timber to secure from the state of Arkansas a permit or license before beginning the execution of their said contracts with the United States.

2. The Supreme Court of Arkansas erred in holding that the said severance tax law was not repugnant to the second clause of article 6 (supremacy clause) of the Constitution of the United States.

3. The Supreme Court of Arkansas erred in holding that the said severance tax statute was not repugnant to clause 2, section 3, article 4 of the Constitution of the United States, which provides that Congress shall have power to [fol. 46] dispose of and make all needful rules regulating the territory and other property belonging to the United States.

For Which Errors, the appellees herein pray that the said judgment of the Supreme Court of the State of Arkansas rendered in the above entitled cause on the 14th day of May, 1945 be reviewed by the Supreme Court of the United States and be reversed, and a judgment rendered for appellees herein and for costs.

Murphy & Wood, by Scott Wood, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 47] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 6, 1945

The appeal herein petitioned for is allowed and ordered upon the execution of a bond by the appellants in the United States Supreme Court, to the appellee, Otho A. Cook, Commissioner of Revenues of the State of Arkansas, in the sum of One Thousand ($1,000.00) Dollars, such bond when approved to act as a supersedeas.

Griffin Smith, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

[fols. 48-49] Supersedeas Bond on Appeal for $1,000.00 approved July 12, 1945, omitted in printing.

[fols. 50-51] Citation in usual form showing service on Herrn Northcutt, filed July 6, 1945, omitted in printing.

[fol. 52] IN THE SUPREME COURT OF ARKANSAS

CERTIFICATE OF LODGMENT

I, C. R. Stevenson, Clerk of said court, do hereby certify that there was lodged with me as such clerk on the filing dates shown on each paper the following: Petition for appeal; Allowance of appeal; Assignment of Errors and Prayer for reversal; Copy of bond; Citation and return; Statement showing jurisdiction; Service pursuant to Rule 12.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Ark., this 7th day of August, 1945.

C. R. Stevenson, Clerk, by A. G. Sadler, D. C.
(Seal.)

[fol. 53] IN SUPREME COURT OF ARKANSAS

RETURN TO ALLOWANCE OF APPEAL

In obedience to the commands of the within allowance of appeal I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this 7th day of August, 1945.

C. R. Stevenson, Clerk, By A. G. Sadler, D. C.
(Seal.)

[fol. 54] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 55] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR CROSS-APPEAL.—Filed August 8, 1945

Otho A. Cook, Commissioner of Revenues for the State of Arkansas, appellant, to the Hon. Griffin Smith, Chief Justice of the Supreme Court of the State of Arkansas:

Otho A. Cook, as Commissioner of Revenues of the State of Arkansas, the petitioner herewith, feeling partially aggrieved by the judgment rendered in the foregoing entitled cause on April 2, 1945, hereby prays a cross appeal from said judgment to the Supreme Court of the United States, from that part of the judgment and for the reasons set forth in the assignment of errors filed herewith, and:

Prays that its cross appeal be allowed, that citation may issue as provided by law and that a transcript of the record and all the proceedings and documents upon which that judgment was rendered duly authenticated, be sent to the Supreme Court of the United States under the law and rules of such cases made and provided, and petitioner further prays that the proper order relating to the proper security therefor be made.

As in duty bound your petitioner will ever pray.

Herrn Northcutt, Attorney for Otho A. Cook, Commissioner of Revenues for the State of Arkansas.

[File endorsement omitted.]

[fol. 56] In the Supreme Court of Arkansas

[Title omitted]

Order Allowing Cross-appeal—Filed August 8, 1945

On the petition of Otho A. Cook, as Commissioner of Revenues for the State of Arkansas, it is ordered that the cross appeal to the Supreme Court of the United States in the City of Washington, D. C., upon the judgment heretofore filed and entered in the Supreme Court of Arkansas, on the 2nd day of April, 1945, be and the same is hereby allowed and it is further ordered that a certified copy of the transcript of the record and all other proceedings herein be forthwith transmitted to said Supreme Court of the United States; and, it is further ordered that a bond on cross appeal be fixed in the sum of One Thousand ($1,000.00) Dollars, conditioned as required by law, but without supersedeas.

This the 8th day of Aug. 1945.

Griffin Smith, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 57] Bond on cross appeal for $1,000.00 approved and filed Aug. 8, 1945, omitted in printing.

[fol. 58] In the Supreme Court of the United States

[Title omitted]

Assignment of Errors—Filed Aug. 8, 1945

Cross Appellant assigns as error the following:

The Supreme Court of Arkansas erred in ruling in its opinion of April 2, 1945, (L. Rep. Vol. 83, No. 1, Page 938), that the appellants, Warren W. Wilson, et al., are not liable to the State for Severance Tax on timber severed by them from lands held by the United States as original owner, (U. S. C. A. Title 16, Par. 471).

Herrn Northcutt, Attorney for Appellee and Cross-Appellant.

[File endorsement omitted.]

[fol. 59] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

WAIVER OF CITATION—Filed August 8, 1945

Scott Wood as Attorney for Warren W. Wilson, et al., hereby waives issuance of formal citation and service thereof and enters his appearance in the Supreme Court of the United States in the above entitled cause.

This the 8th day of August, 1945.

Scott Wood, Counsel.

[fol. 60] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 61] IN THE SUPREME COURT OF THE UNITED STATES

No. 328

APPELLANTS' STATEMENT AND DESIGNATION UNDER PARAGRAPH 9, RULE 13—Filed August 27, 1945

Come the appellants, and file this as their statement of points relied on and designation of the parts of the record which they think necessary for the consideration thereof, under rule 13, paragraph 9.

Statement of Points

By contract with the United States, appellants agreed to cut and remove certain timber from the lands belonging to the United States in the national forests. The Arkansas severance tax statute levied a tax for the privilege of severing timber. Appellants insist that this statute, as applied to the severing of the timber by appellants in the national forests, is repugnant to the second clause of article 6 of the Constitution of the United States (supremacy clause), and is also repugnant to clause 2, section 3, article 4 of the Constitution, which provides that Congress shall have power to dispose of and make all needful rules regulating the territory and other property belonging to the United States. Appellants insist that the statute is unconstitutional and void for the following reasons:

A. The tax is a tax on the contract of the United States with appellants, which required appellants to sever the timber.

B. Under the contract between appellants and the United States, appellants were instrumentalities of the United States and immune from the tax.

C. The statute requires the appellants to pay the tax and collect it from the owner of the land at the time of severance, and subjects appellants to prosecution and fine for failure to do so; and the United States was the owner of the land at the time of severance.

[fol. 62] D. The statute requires the appellants to secure a license from the State of Arkansas before executing their contract with the United States, and subjects them to a fine for failing to do so, and requires them to make monthly reports to the state of Arkansas with respect to the execution of their said contract, and subjects them to a fine for failing to do so.

These requirements constitute a direct interference with appellants as instrumentalities of the government in the execution of their contract with the government.

Parts of Record to Be Considered

Appellants believe that it will be necessary for the court to consider the following portions of the record:

The complaint, the answer, the stipulation which was filed in the chancery court, except paragraphs numbered 7, 8, and 9, the contract between Wilson Lumber Company and the Department of Agriculture from the beginning to paragraph numbered 7, inclusive, also including paragraphs number 14 and 24 of said contract.

Respectfully submitted, Wm. J. Kirby, Little Rock, Arkansas, Counsel for Appellants.

[fol. 63] Proof of Service of Statement and Designation

State of Arkansas,
County of Garland:

I, Scott Wood, state that I was the attorney for the appellants in this cause in the Supreme Court of Arkansas, and that I did, on the 18th day of August, 1945, serve a copy of the foregoing statement and designation on Herrn

Northcutt, attorney for the appellee, by mailing a copy of said statement and designation to him at his office, C. Otho A. Cook, Commissioner of Revenues of the State of Arkansas, State Capitol, Little Rock, Arkansas.

Scott Wood.

Subscribed and sworn to before me this 23rd day of August, 1945. Nadia Mailhes, Notary Public. My commission expires Sept. 7, 1948. (Seal.)

[fol. 63a] [File endorsement omitted.]

[fol. 64] IN THE SUPREME COURT OF THE UNITED STATES

No. 329

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO RECORD PURSUANT TO RULE 13, SUB-DIVISION 9— Filed August 18, 1945

Cross appellant relies upon the following points:

The Supreme Court of Arkansas erred in ruling in its opinion of April 2, 1945 (L. Rep. Vol. 83, No. 1, Page 938), that the appellants, Warren W. Wilson, et al., are not liable to the State for Severance Tax on timber severed by them from lands held by the United States as original owner (U. S. C. A. Title 16, Par. 471).

U. S. C. A. Title 16, Par. 480, states that all criminal and civil jurisdiction, with certain exemptions, shall remain in the State and that no citizen shall be relieved of his obligations to the State by enactment of the Statute.

As to the designation of the record to be printed, same has been stipulated supra, and will not be repeated.

Herrn Northcutt, Attorney for Appellee and Cross-Appellant.

Service of the foregoing is hereby duly admitted this the 8th day of August, 1945.

Scott Wood, Counsel.

[fol. 64a] [File endorsement omitted.]

[fol. 65] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

Nos. 328 & 329

ORDER—October 8, 1945

In No. 328 further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing on the merits. In No. 329 the appeal is dismissed for want of jurisdiction, sec. 237 (a) of the Judicial Code as amended, 28 U. S. C., sec. 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by sec. 237 (c) of the Judicial Code as amended, 28 U. S. C., sec. 344 (c), certiorari is granted. In both cases the Solicitor General is invited to file a brief amicus curiae if he is so advised. In No. 328, counsel, without restricting their argument in any other respect, are requested to address themselves in their briefs and on oral argument to the following questions:

1. Does the record affirmatively show that the validity of a state statute was drawn in question in the Supreme Court of Arkansas on the ground of its being repugnant to the Constitution or laws of the United States as required by section 237 (a) of the Judicial Code (28 U. S. C., sec. 344)?

2. Does the record affirmatively show that the argument was made in the Supreme Court of Arkansas that the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States?

3. Assuming that question (2), supra, is answered in the negative, does this Court have jurisdiction to consider the argument that the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States? Compare Dewey v. Des Moines, 173 U. S. 193, 198.

4. Do the assignments of error in this Court raise the question whether the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States? Compare Flournoy v. Wiener, 321 U. S. 253, 259.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this order.

Endorsed on Cover: File No. 50,031, 50,032. Arkansas, Supreme Court. Term No. 328. Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, Partners doing business as Wilson Lumber Company, Appellants, vs. Otho A. Cook, Commissioner of Revenues for the State of Arkansas. Enter Thos. S. Buzbee. Term No. 329. Otho A. Cook, Commissioner of Revenues for the State of Arkansas, Petitioner, vs. Warren W. Wilson, Mabel M. Wilson, Richard L. Craigo and Lelia F. Craigo, Partners doing business as Wilson Lumber Company. Filed August 16, 1945. Term No. 328, O. T. 1945; 329 O. T. 1945.